IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JONATHAN J. GEHRICH, ROBERT LUND, COREY GOLDSTEIN, PAUL STEMPLE, and CARRIE COUSER, individually and on behalf of all others similarly situated, Plaintiffs,	
-vs-	Case No. 12 C 5510
CHASE BANK USA, N.A., and JPMORGAN CHASE BANK, N.A., Defendants.	Chicago, Illinois October 22, 2015 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

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(Proceedings heard in open court:)

THE CLERK: 12 C 5510, Gehrich versus Chase Bank.

THE COURT: So, who do we have?

MS. TERRELL: Good morning, your Honor. Beth Terrell on behalf of plaintiffs and the class.

MR. BURKE: Alex Burke for plaintiffs and the class.

MR. ANKCORN: Mark Ankcorn as well for plaintiffs and the class.

MR. FRIEDMAN: And Todd Friedman for plaintiffs and the class, your Honor.

MS. STRICKLAND: Good morning, your Honor. Julia Strickland from Stroock & Stroock & Lavan on behalf of Chase and the Chase defendants.

MR. RAO: Good morning, your Honor. Arjun Rao also on behalf of Chase defendants.

MR. KLIEBARD: Good morning, your Honor. Kenneth Kliebard of Morgan Lewis also on behalf of Chase.

MR. GEFFIN: Good morning, your Honor. Alan Geffin of GPG Law on behalf of the objector, Tamiqueca Doyley.

THE COURT: Which objector?

MR. GEFFIN: Doyley, your Honor, D, apostrophe, O-Y-L-E-Y.

THE COURT: Okay. And your name is?

MR. GEFFIN: Geffin, G-E-F-F, like Frank, I-N, like November. Good morning, Judge.

THE COURT: Good morning.

MR. SAMPSON: Good morning, your Honor. Daniel Sampson on behalf of the objector Tamiqueca Doyley as well.

THE COURT: Okay. And your last name?

MR. SAMPSON: Sampson. Thank you, your Honor.

THE COURT: Do we have any other parties here who -- or any other, I guess, non-parties, parties, whatever, who are here to object?

MR. BURKE: No, Judge. I've searched the floor as well. I have not found anybody.

THE COURT: Because I think that the lawyers for Schlagel indicated that they might be here. And Mr. Dishman, who is representing himself, indicated that he might be here. And the lawyers representing Steve Purgahn, the objector, indicated that they would be here. Is there anybody here in the courtroom on behalf of those objectors?

Nobody's responded. I know I-55 is backed up right now, and it's possible that they might have flown in to Midway this morning. Has anybody heard -- has anybody gotten an e-mail or a text from any of these folks?

MS. TERRELL: No.

MR. ANKCORN: No, your Honor.

MS. STRICKLAND: No, your Honor, and I checked my e-mail as recently as about five minutes ago.

THE COURT: All right. Then we'll just proceed,

then.

So, the plaintiffs had the last word in responding to the objections. So, why don't I let the lawyers for Objector Doyley, that's D-O-Y-L-E-Y, make whatever presentation you would like to make. The floor is yours. You can address whatever it is you'd like to address.

MR. GEFFIN: Thank you, your Honor. And at the risk of repetition, my name is Allen Geffin, your Honor. We represent Objector Doyley.

Let me start, if I may, with a bit of a candid remark. Over coffee this morning, I mentioned to co-counsel that our position this morning may not be a particularly popular one. And as I sit here in this courtroom amongst this bevy of lawyers before the bench, I fear that I may be correct.

Of course, this is a significant matter involving 350-odd thousand claimants. Plaintiffs' counsel on behalf of the class and defendants' counsel on behalf of the defendants have apparently worked tirelessly to bring about a resolution of the matter. We understand that. We appreciate that. And it is not without some measure of discomfort that we come before the Court objecting to the settlement agreement.

To be clear, our objection is limited to the *cy pres* award, or I think the French pronounce it *cy pres*. We don't *per se* have an objection to the amount of the settlement, the

global settlement. We don't *per se* have an objection to the amount of attorney's fees sought by the class counsel.

What we object to, really, in two discrete objections, are the *cy pres* awards as it relates to the dedicated *cy pres* and the residual *cy pres*.

And curiously, we've scoured the law in the various circuit courts of appeal. Most of the decisions that address the propriety of *cy pres* awards first go through a little bit of an analytical approach to where the *cy pres* notion came from in the first instance. And it is now known that it came from the notion of trust law. It's relatively new, the *cy pres* award, in the context of class action lawsuits.

As I'm sure the Court has had the benefit of reading many of the opinions, including the recent opinion out of the Seventh Circuit authored by Judge Posner, and I'm referring in particular to *Pearson v. NBTY*, which is published at 772 F.3d 778. There, Judge Posner, like many of the jurists from the other circuit courts of appeal that we cite to in our brief, traces the history of the *cy pres* award, and notes the importance of the award and its purpose.

The purpose of the award is to -- is somewhat conditional. It is: What do we do when there are, either, A, funds remaining after a settlement agreement is entered into and the claimants have been made whole, or, alternatively, B, if it's simply infeasible to pay all of the claimants?

An example, for example, of infeasibility might be where a claimant would receive 50 cents, but it would cost perhaps a dollar to transmit the 50-cent payment to the claimant. In those certain limited contexts, the courts have said that a *cy pres* award is indeed appropriate.

Let's focus on this case and what the *cy pres* award first is intended to do and, in fact, does. We now know that particularly in this circuit, the Seventh Circuit, that a settlement of a class action lawsuit creates vested property rights in the claimants. The settlement funds, which these parties want this Court to approve today, are now the property rights of the various claimants. It's, to be colloquial, the claimants' money.

What these folks have endeavored to do by cobbling together their settlement agreement is create a, quote, "dedicated," close quote, *cy pres* award. And in so doing, they propose to take a million dollars of the settlement fund and ascribe that million dollars to members of the -- I believe they call it the, quote, "alert class," close quote.

Unfortunately, that's improper because you can't take that million-dollar dedicated fund until -- unless and until the class members are first made whole. And as we posit in our --

THE COURT: So, what's your objection to this million dollars? Is it that the alert subclass is getting any money

at all, in light of the fact that everybody agrees that they have no conceivable claim; or is it that -- so, first, is it that the million dollars should be going to the other subclasses and zero should be allocated to the alert subclass, or is your argument that if you're going to give a million dollars to the alert subclass, they should get the money and not the Consumer Federation of America?

MS. TERRELL: The former, not the latter.

THE COURT: Okay.

MS. TERRELL: The very notion of the *cy pres* is first and foremost to distribute funds for their, quote, "next best use." But you can only do that if the, quote, "very best use" of the funds has been exhausted. The very best use of the funds is payment to the claimants. And by taking a million dollars, as we perhaps uncharitably describe in our moving paper, by diverting a million dollars, you, in fact, divest those claimants of one of their property rights, their right to receive pro rata that million-dollar fund.

So, in effect, it's the former proposition articulated by the Court. You can't, as a matter of law -- and this is precisely what Judge Posner speaks to in the *Pearson* opinion. You can't as a matter of law simply say, "Well, we'll take their property rights, a million dollars, and we'll give it to some charity." It's simply impermissible under federal law.

THE COURT: Just one thing, and then I have to mention, in case you end up upstairs -- and I'm doing this as a favor to out-of-town counsel. If you're upstairs, you never, ever refer to an opinion as Judge So-and-So's opinion. It's always the opinion of the Seventh Circuit.

MR. GEFFIN: I appreciate that.

THE COURT: I just saved you about five minutes of grief if you ever end up upstairs.

MR. GEFFIN: Well, and for the 30 seconds of grief that I'm currently --

THE COURT: It wasn't grief. It was just a friendly suggestion.

MR. GEFFIN: I appreciate that. I will accept that suggestion in the manner in which it was intended. Thank you, your Honor.

Let me endeavor not to make that mistake again. The Seventh Circuit in its *Pearson* decision was very clear about the *cy pres* award and how in *Pearson* it was improper. The rationale of the Seventh Circuit in *Pearson* frankly is applicable here and should be the rationale of this Court. I say that respectfully.

As much as everybody in this room except for the objector wants this matter resolved, and as benevolent as the defendants may appear to be by suggesting that a million dollars ought to go to some charity, it simply cannot be done.

It is impermissible.

And that's as to the dedicated *cy pres* provision of the settlement agreement. But there's yet another problem with the settlement agreement as it relates to the *cy pres* program, and that's with respect to the residual *cy pres*.

THE COURT: Now, the residual is just if the people in the first -- the people in the first round who don't cash their checks, so what should we do with that? And what the plaintiffs and the defendant is saying -- are saying is that, "For the folks who don't cash their checks, we'll put that money in a bucket; and if we can distribute it, fine. And if it's too little to distribute, in other words, if it's going to cost 50 cents to mail everybody a check for 37 cents, then we'll give it to the Electronic Frontier Foundation."

So, what exactly is wrong with that picture?

MR. GEFFIN: It's the facts that are the foundation to the picture that are -- is problematic.

In order for you to even have the potentiality of a residual *cy pres* award, the parties have stipulated to a cap on the number of claims that may be made by members of the class. For example, there is one claim that may be made if, I believe, you had a telephone call or a text message related to a bank account and one claim as it relates to a charge card.

That artificial cap has been deemed improper and unenforceable by the various circuit courts of appeal because

in capping the recovery, the parties have *ipso facto* ensured that no claimant, or at least no claimant who received more than, for example, two calls, will ever be made whole because those claimants have the right, the property right --

THE COURT: I don't follow where you're going. Because my understanding is that the first set of checks go out. X number of people don't cash the checks. That money goes into a bucket. And if it's feasible to do so, that money then gets distributed to the people in the first round, so there's a supplemental payment to those people.

And then if those -- whatever checks don't get cashed in that round -- whenever there's uncashed checks in whatever round it is where it would cost more to distribute it than it would be to just give it -- than -- it would cost more to distribute it than the pool of money, in that situation, it goes to a *cy pres*.

So, I don't -- I don't follow where you're going.

MR. GEFFIN: Let me see if I can -- if I can perhaps state this with a little more clarity. There's really two problems with the residual *cy pres* award. Let's start with the -- what I characterize as the fundamental problem.

The fundamental problem is the notion of a cap, the fact that no claimant, no claimant regardless of the number of calls or text messages that that claimant may have received, may file more than two claims. And if we stop the analysis

right there, Judge, which would be appropriate if that was the only issue, that in and of itself is improper.

THE COURT: Okay. I don't understand how that objection -- I understand the objection. I don't understand what it has to do with the residual *cy pres*. It seems to be an orthogonal issue. You seem to be saying, look, in adding up the number of points that -- or whatever, credits or whatever the metric is, people ought to be able to have the number of points based on the number of calls that they received.

MR. GEFFIN: Yes.

THE COURT: That has -- why are you using the residual *cy pres* issue as a vehicle for presenting that objection?

MR. GEFFIN: Because the notion of a *cy pres* is to pay some next best use, some other beneficiary. But if the credits, to use the Court's expression, are insufficient to make a party whole, then there can't be a *cy pres*. First and foremost, the claimants must be made whole.

So, if the Court accepts my proposition just for argument's sake and an individual claimant would be entitled to more credits, then that claimant would be entitled to payment from the, quote, residual *cy pres* award. That's where the money ought to come from.

It's not -- unless and until every claimant is made

whole, then you start even looking at the issue of a *cy pres* award. And what I'm suggesting to the Court is by capping it, that's tantamount to an acknowledgment, "We're not going to make these people whole."

Am I any clearer? And if not, I apologize.

THE COURT: It may be me.

MR. GEFFIN: It may be me.

THE COURT: But I'm just not -- it seems like you're mixing apples and oranges. Like, the only situation -- my understanding of the residual *cy pres* -- and if my understanding is wrong, you'll tell me. My understanding of the residual *cy pres* is if there ever comes a time where the amount of money left to be distributed is less than the cost of distributing that money, then that money goes to a *cy pres* for the residual.

MR. GEFFIN: And therein lies the second half of the problem with the residual *cy pres*. What I was trying to explain to the Court is even before you address the second half of the problem is the fundamental problem of the cap, which ought not be there.

May I defer to co-counsel? And perhaps he'll do a better job than I in --

MR. SAMPSON: May I take a shot, your Honor --

THE COURT: Sure.

MR. SAMPSON: -- at clearing this up? And perhaps I

won't be able to, but I'd like to try.

Imagine there are only 10 claimants and each of them received four calls. That would be statutory damages of $2,000 apiece. The settlement agreement says they may only make claims for two calls, which would be statutory damages of a thousand dollars apiece.

So, now there's -- there's about $20 million available to fund the payments to these 10 claimants. They will all get $2,000. There will now be all this other money left over to go to *cy pres*, but it's only left over to go to *cy pres* because the settlement agreement has said that the claimants may only make claims about two calls instead of the four that they actually received.

So, instead of making them whole and giving them their damages, which there is money available to give them their full measure of damages for all four calls, the settlement agreement says, "No, you may only receive for two calls, and the rest of the money goes to the residuary *cy pres*."

So, your Honor, if your explanation of the settlement agreement was correct and that everyone would receive their full measure of damages prior to residuals going to *cy pres*, then of course there would be no problem. That's exactly what a residuary *cy pres* program is for. But because Chase doesn't seem to have records of how many calls were made to the

claimants, they've said, "Okay. We're only paying for two calls, one credit card, one bank account, doesn't matter how many. And if you received more calls, well, you can just opt out of the settlement."

But that's not what Rule 23 assumes for opt-outs. Opt-outs are for people who want to make their individual claims. This is not, "Oh, we're just going to cap how much money you can receive under the settlement agreement."

If it was full pro rata, in other words, every claimant come forward with your phone records and show how many times Chase called you, and then everyone will receive their pro rata distribution until it's infeasible to give you more, and the amount that's uncashed checks or infeasible goes to *cy pres*, we would have no valid objection to the residuary. The problem is when you combine a cap on the number of claims the claimants can make with a residual *cy pres* that you get to the problem that we are describing.

I hope I've cleared it up a little.

THE COURT: I'm so sorry. And again, it may be me.

MR. GEFFIN: Thank heavens.

THE COURT: It may be me, but we don't have a situation, though, where there's $20 million to fund 10 claimants and there's a cap. The cap is not going to result in there being this huge pot of money that's going to go to a *cy pres*.

That's one way in which -- like, there's a huge pot of money. Each claimant has a cap. There aren't enough claimants to use up the money, so let's give the $19,980,000 to the Consumer whatever, the Consumer Federation of America.

The money is going to get used up, and it's going to continue to get used up until we reach -- we reach the point in the law of diminishing returns where it's going to cost more to distribute the rest of the money than there is money to distribute.

MR. SAMPSON: If I --

THE COURT: And I don't see -- so, your cap hypothetical doesn't work or is not this case. It is -- it may be the *Pearson* case. It may be the *Pella* case. It may be the *Redman* case, but it's not this case.

MR. SAMPSON: I mean, I would agree that should -- if there were enough claimants making two claims, the 390,000 claimants making two claims to exhaust the fund, that the residuary *cy pres* portion of Miss Doyley 's objection would be moot.

THE COURT: Isn't that what we have?

MR. SAMPSON: Well, I don't see either Chase or the plaintiffs making that argument. They don't seem to suggest that the fund is going to be exhausted. If they come up and say yes and with the calculations that the fund would be exhausted, then we would rest on our objection to the

dedicated *cy pres* award.

Certainly, under the circumstances that your Honor is suggesting, then absolutely, the residuary portion of our *cy pres* objection has become moot, if the 390,000-some claimants will exhaust the fund or substantially exhaust the fund.

THE COURT: Okay. All right. Thanks.

MR. SAMPSON: Thank you, your Honor.

MR. GEFFIN: Judge, may I leave one last --

THE COURT: Sure.

MR. GEFFIN: -- and hopefully lasting thought on the Court's mind?

As it relates to the dedicated *cy pres* award, I've made some hay on the *Pearson* decision. I'd like the Court to likewise be mindful of the cases in the other circuit courts of appeal, including the *Klier* opinion in the Fifth Circuit Court of appeal, because really *Klier* is the first case upon which the successor cases follow.

And *Klier*, like *Pearson*, goes through a fairly in-depth analysis, including even a definition of *cy pres* in the first instance, of what a *cy pres* award is, when there ought to be a *cy pres* award, and more critically, when there ought not be a *cy pres* award.

And it's clear in reading *Klier* -- in fact, with the Court's permission, I'll quote from one of the critical

paragraphs. "Because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members. The option arises only if it is not possible to put those funds to their very best use benefiting the class members directly."

And therein lies the problem with the dedicated *cy pres*. Had these parties gotten together and said effectively, "We're not going to have a dedicated *cy pres*. We'll have a residual *cy pres*. Let's take all the settlement funds and use them for their very best use," then it's arguable we might not be here at all; but that's not what these parties have done.

What apparently Chase has opted to do is try to buy some peace, and said, "We'll tell you what we'll do. We'll take a million dollars and ascribe it to some" -- whoever it is -- "regardless of what claimants ultimately recover." That's not the very best use of the settlement funds. The very best use of the settlement funds is to pay the claimants in an effort to make them whole. And by taking a million dollars and moving it out of that fund, you completely undermine the notion of a *cy pres* distribution in the first instance.

And the Fifth Circuit, the Eight Circuit, I believe the Third Circuit, and now the Seventh Circuit have all said

that that is inappropriate.

THE COURT: Okay.

MR. GEFFIN: And it's for that reason that Tamiqueca Doyley objects to the *cy pres* portion of the settlement agreement.

THE COURT: Okay. Thank you.

MR. GEFFIN: You're welcome. Thank you for your time, your Honor.

THE COURT: So, let's just focus on the *cy pres* issues, and I don't know who wants to address it. And I can imagine a lawyer being in a situation where the judge has made a misapprehension or can't understand something and that misunderstanding is to the lawyer's benefit. And there's a temptation to say, "Yeah, Judge, you're right, you're right," when in the back of your mind, you know that the judge is completely missing the point. I'm going to ask that you resist that temptation and tell me, am I missing anything on the residual *cy pres*?

MS. TERRELL: No. Let's start there, and although we didn't confer, the way the settlement is set up, the fund is exhausted. And so as I understand it, to a large extent, that disposes of their objections to the residual *cy pres*.

And, in fact, we bent over backwards to make sure that we were adhering to all of the newer requirements with regard to *cy pres*, which is to do a second distribution --

well first of all, only uncashed checks, right? We do a second distribution, get the money out to as many folks as we can, and this pot of money that will go eventually to the Electronic Frontier Foundation starts with the uncashed checks.

That's true in every class action settlement. We don't understand why people who file a claim and then get a check don't cash them, but it happens more often than you would imagine. So, there's going to be a little pot of money. And that uncashed check amount, then we're going to try and distribute that again to the folks who made claims and actually cashed their checks. And then whatever is left there, if there are opt-outs or other folks from the class who could have made a claim, Chase has the ability to make settlements with those folks. And then out of that amount, anything that is left goes to the Electronic Frontier Foundation.

The whole goal was to spend almost every dollar possible on people who are within the class, and that's what this *cy pres* distribution does. And so --

THE COURT: That's the residual *cy pres*?

MS. TERRELL: As to residuals, that's right. That's right.

THE COURT: All right. Does Chase have anything to add?

MS. STRICKLAND: No, your Honor. I do have one comment on the dedicated *cy pres* when we get there.

THE COURT: Okay. We're going to get to that in a second. Anything else on the residuals?

MS. STRICKLAND: Nothing. Plaintiffs have described it absolutely accurately.

THE COURT: Okay. So, on the dedicated, both sides seem to agree that the alert call subclass has no viable claim because there's consent. Why should we give a million dollars to these people -- or why should we use these people as a vehicle for the plaintiffs' lawyers to give a million dollars to the Consumer Federation of America?

MS. TERRELL: We spent a lot of time negotiating that point, and we would have preferred, given that the alert subclass -- or the alert folks don't have claims that in our view are valuable at all, to have cut them out of the class. It was a requirement of the overall settlement that those folks release their claims.

So, the only way that I felt comfortable doing that was to make sure that the amount that is there that's getting distributed to people that have good claims, everybody who's not in the alert subclass, that that money was enough.

So, the presupposition or the assumption of the objectors is that the $33 million that we had to pay the people who are in the other subclasses isn't enough; but, in

fact, all of the factors with regard to settlement of those claims are satisfied in terms of it being a fair, adequate, and reasonable settlement.

And the reason that it's so important to have set aside money just for the alert subclass is so that those -- I think it ends up being 13 million class members, it's a lot, so that those folks's really claims that I think are worth nothing don't dilute the claims of those who have very good claims and are getting a very good dollar settlement out of this -- out of this deal.

And so that's why, in order to have the folks get $33 million set aside for real claims, we had to have an amount that went to *cy pres* so that we could have a release, we'd have consideration and release for those in the alert subclass. So, they're tied together.

THE COURT: So, I used to think there was only one problem with the dedicated *cy pres*. Now there are two problems with the dedicated *cy pres*. The first problem is these people shouldn't be getting any money at all. Chase is willing to pay $34 million. Chase doesn't care how it's allocated. The $34 million should go -- or whatever portion is for the class members should go to people who actually have claims. That's the first problem.

The second problem is if you're -- you're having them release their claims and getting nothing in return, so I --

so, you're saying you didn't want to do it, but Chase wanted you to do it, so let me turn it over to Chase and ask Chase to address this alert subclass.

MS. STRICKLAND: Thank you, your Honor. Well, what I stood up to say in the first instance was that the objector is completely wrong in terms of how the settlement was negotiated. It was not negotiated as a $34 million settlement with a million dollars to go to the dedicated *cy pres*. It was actually negotiated as a $33 million settlement with a million dollars. So, there's no taking away from anybody for that million dollars.

THE COURT: That is so unpersuasive. Money is fungible. It doesn't -- I mean, you can say, "Well, it's 32 and 2 or 31 and 3, or 33,950,000, and 50,000." It doesn't matter to Chase. Money's money.

MS. STRICKLAND: But, your Honor, in terms of how it was negotiated, I think it's an important point, because the objectors' argument was that there was this vested right. That vested right did not exist in this particular group because there -- there was no money allocated. The million was not allocated ever to the class members other than the alert subclass.

With respect to why we insisted on the release with respect to that group and the consideration given to them, it's actually twofold. We insisted on it because there were a

number of class actions settled through this case. Certain of those class actions actually made claims based on alert calls, and certain of the named plaintiffs actually received alerts, which were included within the case.

So, we were not prepared to settle a case and leave these claims hanging out there, which we agreed did not have any significant value; but on the other hand, we were being sued with respect to those claims, and we wanted a release for them. It's a very practical point, because they were in the case based on the allegations. So, we wanted to settle the cases as they were filed.

And absent every one of those plaintiffs stating on the record, "Those claims are worth zero and we don't have a claim. We'll dismiss those class claims with prejudice," which they can't do without a certified class, we wanted a release of claims that had been asserted, very simple.

With respect to the consideration given, actually, there's consideration in addition to the million dollars. We agreed as part of the settlement through the notice process to give people instruction, class members, and you know, there was wide notice, including publication notice and the like, as to how to actually opt out of alerts. We gave them very clear instructions additional to what is already provided in the ordinary course by Chase.

So, it was -- it's not injunctive relief, because

it's not an injunction, in quotes, but it is in the nature of an injunctive decree.

THE COURT: So, you've -- Chase has agreed to follow the law as consideration?

MS. STRICKLAND: I don't think that's actually -- the law doesn't require us to give additional opt-out instructions. They already give opt-out instructions. This is something additional to what they would do in the ordinary course. Chase is already following the law, but this is telling people again and again how to do it if this is an issue for them.

THE COURT: Okay. Why a million dollars?

MS. STRICKLAND: Because that was the negotiated amount. There's -- there's no --

THE COURT: That's a tautological answer. Why was a million dollars the negotiated amount?

MS. STRICKLAND: There's no magic to that number, your Honor. It could have been less. It could have been more. I'm just being candid with the Court.

There are obviously a lot of people in that group. We don't think any of them really have viable claims. There may be a small number where somehow there's a glitch or something. We don't think that's the case. But it seemed like a fair number in addition to what I referred to as sort of the quote, unquote "injunctive" type relief.

THE COURT: Why don't I just decertify the alert subclass?

MS. STRICKLAND: Because, your Honor, the claims by those plaintiffs still exist, and we would like to get a release of those claims unless we somehow get a dismissal with prejudice of those claims. I mean, if your Honor issues an order saying that class could never be certified, I could perhaps live with that, subject to consultation with our client; but what we're not interested in doing is spending 33-plus-1 to buy peace and discovering that, in fact, we have not bought peace with respect to a bunch of people who actually filed lawsuits, even if they're baseless.

THE COURT: Okay. Do you have any thoughts -- well first of all, I think there were a couple of folks who came in after the case was called. Is there anybody who's come in -- everybody's welcome to be here for whatever reason. I just want to make sure, is there anybody who's come in who's an objector who hasn't yet made an appearance?

Okay. Nobody's stepped up, so why don't you go ahead and address that issue.

MS. TERRELL: I think the only additional point I want to make with regard to why a million dollars is that we had to be convinced that $33 million was enough to adequately settle the claims of the non-alert subclasses. That was our focus. So, it needed to be enough to support a release on

behalf of the 13 million sub alert folks, the million dollars; but our real focus was making sure that we had enough money in the $33 million to take care of those who again had real claims.

And it was -- it was a deal point, and to us, it was -- we had to make sure that we took care of the folks who could make claims against the $33 million.

THE COURT: But Chase is willing -- to buy global peace, Chase is willing to pay $34 million. Why allocate 3 percent of that to people who you -- even you believe have no claim? Because in order to get the alert calls, you necessarily had to -- alert calls that aren't mistaken alert calls --

MS. TERRELL: That's right. That's right.

THE COURT: -- you necessarily had to consent. Why shouldn't they just get just a much more nominal award?

MS. TERRELL: Because of the shear number of people in that alert subclass. I mean, it was 13 million, a lot.

THE COURT: But the value of what they have is zero, so 13 million times zero is still zero.

MS. TERRELL: I don't disagree.

MS. STRICKLAND: But, your Honor, I need to say that the value of their claim may be zero, but the cost to us of dealing with their claims is not zero.

And if what your Honor is suggesting is that maybe

the number shouldn't be a million, it should be 500,000, that's, you know, obviously something we would --

THE COURT: That's still an order of magnitude too high.

MS. STRICKLAND: -- we would entertain.

Your Honor's correct in terms of it being fungible, but a deal point was find a release because those cases are expensive to defend. There may be somewhere someone out there in that population who maybe thinks they have a real claim. Maybe there was a quirk. Anything's possible, right? But since the named plaintiffs, some of them had alert calls and were making claims, we were not prepared to settle without that group covered.

THE COURT: If I were to reallocate $950,000 or $990,000 or $995,000 from the alert subclass to -- and I'm going to ask Mr. Geffin and his colleague about this as well, Mr. Sampson.

If I were to reallocate money from the alert subclass to the other subclasses on the ground that if it were up to me the alert subclass would get zero, but I understand that a component of the settlement is that Chase buys peace with respect to the alert subclass and there has to be, like, something given to them, would that decision be vulnerable on any factual or legal ground, vulnerable to challenge on any factual or legal ground?

In other words, am I being unfair -- if I do that, am I being unfair or violating the rights of people in the alert subclass?

MS. TERRELL: I don't believe so. The notice that went out told folks that they were going to get nothing for those claims, and so that would still be true. It would just be the magnitude that is going towards the *cy pres*.

I'm not aware of any specific authority that requires a threshold monetary amount for consideration to support a release when you're talking about *cy pres*.

THE COURT: Okay. And again, just to be clear, everybody agrees that this is the release of claims that have no value, and all they have is a dead weight loss cost on Chase for having to litigate it.

MS. STRICKLAND: Well, your Honor, I agree that that's correct. What we don't know is whether there's some few people in there where something odd happened in the Chase system.

THE COURT: What do you mean?

MS. STRICKLAND: I mean, for example, just a computer quirk or something like that. We're not aware of that happening, but in terms of reallocation, you know, obviously, the problem with that, of course, is the Seventh Circuit. And, you know, this is a little bit squishy. And people can look at whether 5,000 is appropriate or 50,000 is appropriate.

There's no set standard for looking at this issue.

You know, if the Court wants to reallocate, may I suggest that the reallocation be not quite so aggressive as your Honor suggested.

THE COURT: Okay. Let me ask Mr. Geffin or Mr. Sampson or both whether they have any thoughts on the issues that I've been discussing with plaintiffs' counsel and Chase's counsel.

MR. GEFFIN: Thank you for the opportunity, your Honor.

MR. SAMPSON: Thank you.

MR. GEFFIN: With your permission and a little bit of some perhaps hinted guidance, I'm going to table the issue on the residual *cy pres* for the time being and focus my commentary, and I'll invite Mr. Sampson to do the same, as to the dedicated *cy pres* award.

I think first and foremost the Court has very aptly hit the nail on the head as to the $34 million fund. And it's easy now for counsel for the class and Chase to come before the Court and say, "Well, it was never 34. It was always 33, and we just threw a million dollars in to secure releases from plaintiffs who have no claims in the first instance."

What's critical about the dedicated *cy pres* -- and this is addressed by *Klier*. There is a settlement fund.

THE COURT: If you could move the microphone further

towards you.

MR. GEFFIN: Can you hear me better, your Honor?

THE COURT: I'm more worried about the people in the gallery.

MR. GEFFIN: Understood. There is a settlement fund. The negotiations that go on about that settlement fund are wholly irrelevant to this Court's analysis today. What is relevant today is the amount in the fund, $34 million, of which $1 million will be utilized to, quote, "pay," close quote --

THE COURT: Okay. You've already -- I wouldn't -- if I were you, I wouldn't focus on things that you've already won because the only thing that can happen is things could get worse for you. I would focus on the question of the reallocation.

MR. GEFFIN: Judge, here's the candid response. If the Court --

THE COURT: Have you been giving me uncandid responses to my other questions?

MR. GEFFIN: No, but I've been much more delicate.

THE COURT: Because that's the negative implication of your saying, "Here's the candid response."

MR. GEFFIN: We don't have a problem with the reallocation on the order of what the Court has suggested, 950,000 to go to class members and 50,000 to go, for example,

to the *cy pres*, or even 995 to the class members and 5,000 to the *cy pres* beneficiary.

Of course, we would have to discuss it with our client. We would recommend certain things to our client that are beyond the pale of this Court insofar as the privilege goes, but I will advise the Court that a reallocation on the order of what the Court has suggested is not offensive to the objectors' counsel.

MR. SAMPSON: Yeah. I believe that there's a provision in the settlement, although Chase hasn't brought it up yet, that would permit Chase to essentially eject from the settlement if the Court reallocates it in that manner.

That said, assuming that Chase doesn't do so, of course, we represent the client, who has objected to this provision, and the legal argument would be the same whether it's $5,000 or a million dollars. That said, presumably our client would simply ask to be compensated for making the objection. It's not going to go to the Seventh Circuit regarding a $5,000 allocation. We would not -- we would not suggest to her that that would be a good allocation of her time and resources.

THE COURT: Okay. And what subclass is Ms. Doyley in?

MR. SAMPSON: The collection call, not the alert.

THE COURT: Okay. And is she a bank person or a

credit card person?

MR. SAMPSON: I think she's both.

MR. GEFFIN: I believe that's correct.

THE COURT: Okay. All right.

MR. SAMPSON: That's in the court file, because we filed her claim form with her objection.

THE COURT: Okay. All right. Thanks.

MR. SAMPSON: Thank you, your Honor.

MR. GEFFIN: Thank you.

THE COURT: So, anything else on the *cy pres* issues from anybody? No?

All right. Let's -- and have any other objectors appeared in the courtroom since we started a little after 10:00? Nobody's appeared, so I guess it's incumbent on me to address some of the other issues. I'm not going to address all of the issues that were presented in the objections. I'm going to address the issues that I think are of reasonable concern.

So, let's first talk -- and this is -- I'm comfortable with what happened, but I just want to get a full explanation on the record as to what happened to the 7.1 million people. And if you could just take me through the timeline. And again, I said this was okay. The discussion of it may not have been as complete as it should have been, so if we could just get that on the record.

MS. TERRELL: Yeah. Let me get that in front of me.

So, initially, Chase transmitted about 8-1/2 million consumer bank records to Garden City Group. Just so your Honor knows, as I promised I would, I took a deposition to establish all of these facts, and that's what these facts are pulled from.

Chase then discovered that it had only pulled data for its consumer bank class members from its active database, so Chase went back to its data warehouse and discovered another 7.1 million records. And when the claims administrator de-duped those records, his number was somewhat reduced. And so we sent supplemental notice to those additional class members.

So, it was as simple as they just didn't pull from both databases.

THE COURT: And what was the second database?

MS. TERRELL: The data warehouse.

THE COURT: And who was in that database?

MS. TERRELL: As I understand it, it's a matter of timing. So, it was folks who were further back in time.

THE COURT: I see.

MS. TERRELL: That they just pulled it from their active database, so people who had current accounts --

THE COURT: So, these are people who no longer had accounts at the time the 8.1 million were generated, but at

the time of the calls, they did have accounts?

MS. TERRELL: That's my understanding.

THE COURT: Okay.

MS. TERRELL: That's correct.

THE COURT: Is that right?

MS. STRICKLAND: That is correct, your Honor.

THE COURT: Okay. And I know we've set back everything by a couple of months, two or three months after that happened, so --

MS. TERRELL: And again, we propounded discovery, and they did a full investigation and produced someone who explained that investigation, walked through the data in quite an amount of detail and explained what had happened, so --

THE COURT: Okay. All right. I'd like to talk about attorney fees. And there are three issues I'd like to address, and they're interrelated.

The first issue -- the first question is -- I'm just going to lay them out.

The first question is: What's the magic about $9.507 million? That was the amount requested in the August 14th brief, where using the correct denominator, it was 33.3 percent.

Then in the October 8th brief, when the denominator was reduced a little bit because the notice costs went up a little bit, you kept the same $9.507 million attorney fee, and

then said it's now 34 percent.

So, the first question is: Why between August and October you didn't reduce the attorney fee amount to 33 percent of what the denominator at that point was.

The second issue has to do with the lodestar cross check. The objectors suggested that the Court ought to at least look at the lodestar; and as you know, in the Seventh Circuit's recent cases, the Seventh Circuit has said a court can look at contingency fee, can look at lodestar, either one. And if that's true, I think the Court can look at both.

And in response, the plaintiffs essentially said lodestar doesn't matter and didn't say anything about what the lodestar actually was. And the only reasonable inference to draw from that is it wouldn't be good for the plaintiffs if I were to see what the lodestar was, because if it was a good story, it would have been told.

And finally, some of the recent Seventh Circuit decisions, *Silberman* in particular, *Silberman versus Motorola,* 739 F.3d 956; *Americana Art*, 743 F.3d 243; and then Judge St. Eve addressed the matter in more detail in the *Craftwood Lumber* case, 2015 Westlaw 1399367.

Why have a straight percentage of the recovery, of the total recovery, why make it 34 percent or 33 percent for the entire recovery, as opposed to having cascading percentages as the Seventh Circuit suggested would be

appropriate in the *Silberman* case?

So, go ahead.

MS. TERRELL: I think I only heard two issues, so it's just two sub-issues under lodestar. Okay.

THE COURT: Well, the first one is -- even if I'm wrong on -- the first issue was why go from 33.3 percent to 34 percent, even assuming that the lodestar cross check and the cascading percentages issue goes away? And you can address those in any order you like.

MS. TERRELL: We'll just take it from the top. There's no magic number with the $9 million and change. What we did is once the full numbers were in and we had adjusted for the additional notice costs, we looked at what the percentage was and whether it fell within the range of reasonableness in the Seventh Circuit, and we decided that it did.

We're within the *Pearson* presumption, which is if it's a percentage of a true common fund, anything up to 50 percent is okay. So, we thought, "We're just going a little bit up to 34 percent, over a third," and so to us that seemed reasonable.

In addition, it's within the scope of our retainer agreements with our plaintiffs, which courts in this circuit have found to be relevant in terms of setting the expectations of the parties.

And it's also within the mean and median of Professor Fitzpatrick's study, which was something that was presented to Judge Holderman and is in the papers here, where his mean is 27.4 percent and the median is 29 percent.

So, again, it's just consistent with the amount that has been asked for. And again, the percentages, 28.7 percent of the fund, if you only exclude the *cy pres* -- so if you take a percentage of the full $34 million -- or the full $33 million, including the cost of notice and claims administration, which is what -- which is the apples-to-apples comparison with Professor Fitzpatrick's study, then again, we're at 28.7 percent, so we're within that range.

So, from our perspective, even though the notice costs had gone up -- and we -- obviously, we think it was beneficial. We had to send some additional notice. We also did a reminder campaign, which we thought was a good idea. We felt that the amount of fees that we were seeking was still reasonable and should not be reduced for that amount.

THE COURT: Didn't the Seventh Circuit look at different studies that had lower percentages?

MS. TERRELL: They did, but -- well, they've definitely looked at and adopted Professor Fitzpatrick's study. The question is always whether the percentages when being calculated include the notice and claims administration costs or not.

And again, Judge Holderman, you know, he just did two of these settlements in the last year, and he found -- you know, he found percentages in that range to be reasonable.

I mean, courts in the Seventh Circuit routinely approve fees of a third, just a straight third of the common fund, especially when -- only when it's really a common fund. This is an actual full amount of money that Chase is going to pay with no reversion.

THE COURT: Right. But in common fund cases that -- where the common fund is in the mid eight figures?

MS. TERRELL: Well, when we looked at those studies, though, and when we briefed this extensive with Judge Holderman, normally the jumbo cases, where they've done the *Synthroid* sliding scale, it's substantially above $34 million. I think it's usually starting at 45, 50 and above.

So, for example, in *Capital One*, it was a $75 million fund, and there wasn't any doubt that the judge was well within his discretion to treat that as a mega-fund and do some sliding scale.

THE COURT: So, why shouldn't we do the sliding scale in this case?

MS. TERRELL: I think there are a couple of reasons. Number one, this is -- this is a -- it's below the mega-fund threshold. Number two, this case was very, very risky. Not only were there a substantial number of class members who were

bound by arbitration clauses, which would mean to a certain extent their claims would be worth virtually nothing; but there was also a very solid consent defense for many of the other class members, and it would have been very hotly litigated.

In addition, it would have been difficult to prove the claims because of the data issues that we have discovered along the way and have had to deal with.

And so, you know, the risk to the plaintiffs of receiving nothing was very substantial, and plaintiffs took on that risk as part of the contingent fee.

THE COURT: But that's also true in the cases that approve sliding scale.

MS. TERRELL: That is also true. That is true.

THE COURT: So, why -- then that's not a reason why we shouldn't do a sliding scale in this case.

MS. TERRELL: You know, in the sliding scale cases, though, there's typically some notion that the first chunk was harder to get than the remaining chunk. So, in other words, the first $10 million or the first $20 million or the first $30 million, there was something that was much more difficult about getting that amount than the rest.

And again, it's usually when there's a lot more at stake than $34 million. In our view, when we looked at it, it was going to -- I mean, there wasn't an obvious threshold,

well, $10 million is harder to get than $34 million.

Which is why, again, I think the Seventh Circuit, and even Judge Holderman, they look at that when you're looking at $50 million or more. There's just a different calculus here.

We didn't see a natural break where it was going to be easier -- there was going to be some sort of dispositive motion so it was easier or harder to get that first 10 to $15 million than the remaining amounts. We just don't believe the mega-fund applies here.

THE COURT: What about the lodestar? Why shouldn't I just say, you know what, negotiated fees -- deference to negotiated fees makes sense when you have sophisticated named plaintiffs, like in a securities case. It doesn't make sense in a consumer case like this where the plaintiffs probably -- I'm not going to say they're unsophisticated, but they're not as sophisticated as the plaintiffs in security cases.

So, why shouldn't I either base the fee on the lodestar or at least look at the lodestar, look at the number of hours that were put in; and if it turns out that the $9.5 million fee would yield an hourly rate of $10,000 or $5,000 or $3,000, that that's something I ought to consider?

MS. TERRELL: Well, your Honor, obviously, it's within your discretion to ask us to provide the lodestar and do the lodestar cross check, and we'd be prepared to do that.

From our experience in these cases, number one, the

amount that we've asked for is the market rate, and that's really what the Seventh Circuit, you know, asked the trial courts to do. And you're right that a negotiated --

THE COURT: And why is it the market rate?

MS. TERRELL: Well, it's the market rate based on a lot of work and surveys that were conducted in the *HSBC* and the *Capital One* cases, you know, where there actually was a lot of discovery that was provided about the amounts that counsel in this case and other cases had received in similar TCPA class settlements.

And at the end of the day, after he had all of that information about lodestar and wins and losses and where we ended up, Judge Holderman ended up not applying a lodestar cross check and finding that the percentages that were requested there were reasonable and within the expectation of the parties at the outset, or it was the market rate.

And this amount is well within that market rate.

THE COURT: Okay. Do you have the lodestar information?

MS. TERRELL: I don't have it with me. We can provide it, your Honor.

THE COURT: Okay. Do you have a ballpark estimate of what it is?

MS. TERRELL: No, I don't. I apologize.

THE COURT: All right. Does Chase have anything to

say about the attorney fee issue?

MS. STRICKLAND: Your Honor, we do not.

THE COURT: And I know there's a clear sailing provision, so you might be breaching the agreement if you say anything in opposition.

MS. STRICKLAND: I would always prefer not to breach the agreement; but in any event, we don't have a view on the attorney's fees. We believe this is within the sound discretion of the Court.

THE COURT: Okay. Could you give me your view as to what the next step ought to be from the plaintiffs' perspective if I decide that certain aspects of the proposed settlement ought to be adjusted?

Do you believe that we need to start from scratch, or do you believe that it would be -- in order to make a record, or do you believe that it would be sufficient for the Court just to make the adjustments, enter the order, and then we're done with it?

MS. TERRELL: Your Honor, I think the only impediment to that is Chase does have the ability to blow the deal if they're not happy with the allocation. So, I would suggest the next steps would be for your Honor to issue an order setting forth your ideas about how to reallocate that amount, and then we'll need to hear from Chase as to whether they're going to go forward with the settlement on those terms. And

if so, then I think we can just implement the settlement that's already been noticed and approved, just with that reallocation.

We would want to provide some additional information to your Honor so that you would know what the average class member is going to receive with the additional funds going to the other class; but because the notice told those in -- number one, the folks who are entitled to a portion of the $33 million, they'll be thrilled, right? There's no prejudice to them. They're going to get more money.

The folks who were in the sub -- you know, the alert subclass, they always knew they were going to get zero, so long as it wasn't a wrong call alert, so there's no prejudice to them that the *cy pres* award has gone down.

So, I don't believe we need to do another round of notice or allow people to come in and object. I believe we can just proceed with that reallocation, again, so long as Chase will agree to a settlement along those lines.

THE COURT: Do you agree?

MS. STRICKLAND: Your Honor, do I agree? I guess to what? I agree with -- I agree with plaintiffs' counsel with respect to not needing to do additional notice --

THE COURT: Okay.

MS. STRICKLAND: -- in the event that your Honor reallocates the dedicated *cy pres* fund. I agree that we don't

have to provide additional notice, which plaintiffs' counsel, I don't think, addressed if your Honor adjusts their attorney's fees down in some way because it would be for the benefit of the class. We don't have an opinion on whether your Honor should do that or not do that, but I don't think it would need to be re-noticed.

And the answer to everything else is it depends, but we have not heard anything today that would suggest that there's something else that your Honor is thinking of.

THE COURT: And you had said earlier that you thought that the reallocation of the *cy pres* that I was -- the numbers that I was batting about were a little aggressive. What do you think would be appropriate, if you can say?

MS. STRICKLAND: Your Honor, I don't really have -- to be candid, I really -- not to suggest I wasn't candid before, to take a page from your Honor's book.

But in any event, I don't have a strong view, because I think it's so inherently judgmental as to where this falls. I mean, this is definitely a situation in which it's art, not science.

Obviously, the more in the dedicated *cy pres* fund, the more comfortable we are that we're delivering value. I don't think that that class is entitled to any monetary award, which is made clear from the settlement; but obviously, you know, the greater the number, the less risk of an objection

and the Seventh Circuit taking anything terribly seriously.

I will say, actually, I want to go back to one of the comments before. Again, that number was separately negotiated. I mean, it isn't a situation where 34 million was allocated. And objector's counsel seemed to take issue with that. The fact of the matter is it was separately negotiated.

But in terms of how that number is reallocated, I would defer to your Honor's most excellent judgment.

THE COURT: Well, I dispute the premise of that last sentence. And I don't doubt what you're saying, which is that it was separately negotiated. But I think at this point, the way I'm looking at it, at this point, I don't care how you got to 34. All I know is that Chase is at 34 for global peace.

Would I -- could somebody in the alert call subclass -- and I'm going to ask Mr. Geffin and Mr. Sampson if they would like to address any of these issues.

Would anybody -- if I were to reallocate a good portion of the $1 million to the classes -- to the other classes, could the alert -- could somebody in the alert call subclass complain that their rights were violated because I did not give them a chance to object to the reallocation?

MS. STRICKLAND: So, the answer to that question is someone can complain about just about anything. The question, of course, is whether the complaint is a legitimate complaint.

THE COURT: Yes.

MS. STRICKLAND: And I believe plaintiffs' counsel addressed that, which is since that money was not actually going out to the alert call subclass and they are getting the benefit of this additional notice program or instruction program, so as not to confuse it with class notice, I don't think that there would be a legitimate basis for complaining that additional notice was not sent out.

MS. TERRELL: The only thing I would add is that something you have in the record, your Honor, is actually comments from class members commenting on how helpful the alerts were. So, I think it's just highly unlikely that we're going to hear from a member of that class complaining that we have reduced the amount going to a third party, because truly, most of the comments about that portion of the settlement were, "I like those alerts. Those are helpful."

THE COURT: So, maybe we should make them pay extra money into the pot and distribute it to the people who got the calls that they didn't want.

MS. STRICKLAND: Your Honor, as I said, excellent judgment. And for the record, that was all in humor.

THE COURT: Mine, too.

Okay. So, Geffin and Sampson, do you have anything to say about any of the things I just talked to plaintiffs' counsel and Chase's counsel about?

MR. GEFFIN: Just a small handful of thoughts, your Honor.

With respect to your direct inquiry to Chase's counsel, our observation is the whole notion of the settlement fund and the notion of the *cy pres* is to use the money for the very best use. And by that I mean the more money that goes from the *cy pres* to the claimants the better. You take that money, and you use it for the very best use. The larger the *cy pres*, then you're going to the next best use, and that's exactly what the courts have asked us not to do.

THE COURT: Okay. How about the issue of re-notice?

MR. GEFFIN: I think both class counsel and defense counsel is correct. The *cy pres* award, by definition, goes to a third party, so I'd query even before they have an objection whether anybody in the alert subclass even has standing to bring such a claim. It's not their money in the first place. It's the third party's money that the Court is suggesting reallocating a great deal of.

I think both lawyers are correct. There is no colorable objection that can be made by an alert subclass claimant. It wasn't his, her, or its funds in the first instance.

THE COURT: Well, it kind of was, but it wasn't going to go to them because each of them would get 8 cents, and it's just better to -- in a situation like that, better to give

it -- that's a situation where *cy pres* is appropriate, assuming that these people had a claim to begin with, which we all agree they don't.

Okay. Anything else?

MR. GEFFIN: Not from me, your Honor.

THE COURT: Okay. I'd like to -- I'd like to mull over some of the matters that we -- we've spoken about. I know that we have some counsel who are in from out of town, and it's conceivable that I could just give you an oral ruling this afternoon, but I don't want to inconvenience anybody who's in from out of town.

So, why don't we go off the record for a moment.

(Discussion held off the record.)

THE COURT: All right. Let me step back. We've been going for about an hour and 15 anyway. Let me step back for a few moments, and I'll come back out at 11:25, and then we'll figure out -- I'll tell you where we're going to go from here. Okay?

(Recess had.)

THE COURT: Everybody can be seated.

So, I forgot to ask about Barry Willis. What was the story with him, the plaintiff who settled?

MR. FRIEDMAN: Yes. This is Todd Friedman. Barry Willis wanted -- ended up wanting to settle individually, so he did.

THE COURT: Okay. Is there -- I mean, was -- when did his decision to settle get made?

MR. FRIEDMAN: At this point in time, seven or eight months ago now.

THE COURT: Okay. And I don't know if you can share this. What -- did he just not want to continue as a class rep?

MR. FRIEDMAN: Your Honor, I don't want to give away too much privileged information, but I think it was more about what he would want to get at the end of the day.

THE COURT: I see. Okay. Do you have any thoughts on Mr. Willis?

MS. STRICKLAND: None, your Honor.

THE COURT: Okay. All right. I'm not going to be able to give -- I'm not going to keep you around because I'm not going to give you a ruling today. Let me just give you my tentative thoughts, and they're more than tentative, but they're not final.

I think that the settlement -- with the exceptions I'm about to mention, I think the settlement is fair and reasonable. The $34 million, I think, is sufficient. I'm not concerned about that. I'm not concerned about how the recovery is being allocated among the various subclasses, like the different points given to the different people. I think that makes sense.

I'm not concerned that the class members are limited to only one claim of each type, and here's why: It's -- I'm persuaded that it's more likely than not that all the class members received the same number of calls, given Chase's practices; and to get into the weeds as to, "Well, this person had five calls and this person had eight calls," the game would at that point no longer be worth the candle in terms of the costs of making those determinations. So, for that reason, I'm not concerned about the limit on the number of claims.

And because the fund is going to get exhausted, with the exception of the residual *cy pres* -- and by that, I mean the fund is going to get exhausted to all of the class members, putting aside the dedicated *cy pres*, if there is one, attorney fees, and notice costs, that's not really a concern, the limitation of the number of claims is not a concern because there isn't going to be any money left on the table.

I don't have any concerns with the notice. I think it was admirable. The notice was beyond the minimum required. I think the notice was admirable, especially going back a second time with the reminder notice.

I think the job that was done in terms of reaching out was probably as good as it was going to get, the direct notice and then the notice by publication. I think the correct magazines were hit.

I don't have a concern with the residual *cy pres* for the reasons that we discussed, which is it's just -- that kicks in only where it no longer makes economic sense to keep redistributing the money left over from the uncashed checks. And at that point, it can either revert, which the Seventh Circuit doesn't like, or it goes to a *cy pres*; and it may as well go to a *cy pres*.

The -- I'm not concerned about the clear sailing provision *per se* because this isn't a situation where there's going to be a reversion and because I'm looking very closely on my own at the attorney fees, as will become clear in a moment.

The two concerns that I do have pertain to the dedicated *cy pres* and to the attorney fees. I don't want to do something that's going to cause the entire settlement to unravel, in other words, that's going to cause Chase to bail. At the same time, I just can't see leaving the dedicated *cy pres* as it is.

So, I'm wondering if there was any guidance that I can get from Chase at this point on -- I don't want to cause -- I don't want to bust the settlement, the entire settlement. Is there any further guidance you can give?

MS. STRICKLAND: I do not anticipate that we would bust the settlement, and my suspicion is that your Honor is as sensitive as we are to not having the Seventh Circuit disagree

with the reallocation. And so again, we would defer to your Honor on the reallocation question.

THE COURT: All right. And the next issue is attorney fees. I am going to want to take a look at the hours that were put in and the lodestar as one factor among many. I know that there are many cases holding that the lodestar cross check is discouraged, and the cases that hold that tend to cite the *Synthroid II* decision from the Seventh Circuit from a number of years ago.

The more recent Seventh Circuit decisions, though, caution against an over-reading of the *Synthroid* decisions, the *Synthroid* opinions, and allow a role, maybe even an exclusive role, for lodestar. And if it allows an exclusive role for lodestar, it certainly -- those decisions certainly allow for at least a consideration of the lodestar.

And I'm not -- I don't want to cause undue alarm on the north side of the courtroom. I'm not considering an exclusively lodestar recovery for plaintiffs' counsel. But it is something I -- that is part of the mix, in my view, and something I'm going to want to take a look at. And I can't -- because that's going to be a piece of the puzzle, I can't give you any numbers at this point.

So, how long do you think it would take to get that information to the Court?

MS. TERRELL: Your Honor, there are a lot of firms,

and we'll want to compile it in a way that it's easy for you to handle. I'd like to have at least 10 days. Is that doable? Yeah. Two weeks?

MR. FRIEDMAN: Maybe a little bit more, maybe two weeks.

MS. TERRELL: Yeah, two weeks.

THE COURT: That's fine. So, why don't -- let's get that to the Court by November 5th, it would be, I think. And I don't believe I need anything else.

MS. TERRELL: What form would you like it in?

THE COURT: Is it -- ideally, it would be filed, it would be of record in case some other court needs to take a look at it.

MS. TERRELL: Right. So, I think the question is sort of how much detail does your Honor want to see? Because often, we've just done -- we can just do categorical amounts, here's the firm, here's the amount, or you can go all the way down to, you know, daily entries. Obviously, we have that.

I guess we would suggest that just providing the amount of lodestar as a starting point is what we would suggest, but we want to make sure we give your Honor the information that you need.

THE COURT: If you have the detailed time records, I may as well get them because they may be pertinent to the analysis. So, why don't we --

MS. TERRELL: We'll work among ourselves to provide information.

THE COURT: Okay. And then once that's filed, I'm going to want to give the objectors an opportunity to weigh in further, given this new palette of information. So, it will be November 5th would be the information being filed. I'm going to give a pretty tight deadline of November 12th for the objectors to say whatever it is they want to say about the lodestar.

And then we'll come back in on a date that I'm not going to set right now, but I'm going to have Jackie reach out to everybody and get a mutually-agreeable date, because I don't want to inconvenience -- unduly inconvenience anybody who would want to come back in. Okay? And that would probably be towards the end of November, after -- not the week of Thanksgiving, the week after Thanksgiving, or maybe the week after.

Okay? And given that, I'm going to give the objectors until the 16th to provide any additional commentary on the attorney-fee issue.

Is there anything else that anybody would like to address?

MS. TERRELL: The only thing I would ask, your Honor, is whether -- now that we've heard your concerns about the lodestar analysis, whether you'd be open to a very brief

supplement on our perspective on those legal issues.

THE COURT: Sure, absolutely. I never stop anybody from filing anything. So, if you could -- could you do that by the 5th?

MS. TERRELL: Yes, your Honor. We'll do it at the same time.

THE COURT: Good, good. And then whoever wants to take issue with what you've said can take issue with what you've said.

MS. TERRELL: And just so it's on the record, we will provide what we are filing with ECF directly to the objectors and/or their counsel as well.

THE COURT: Good. No, there's -- your notice has been exemplary throughout, so I appreciate that, and I'm sure they will as well.

MS. STRICKLAND: Your Honor, without imposing on the Court, and I understand that you suggested deferring setting a date, would it be possible to at least think about a date? Because calendaring between now and the end of the year becomes a little dicey.

THE COURT: Okay. That's fine.

MS. STRICKLAND: If your Honor wouldn't mind.

THE COURT: No, not at all. I'm assuming nobody wants to come in the week of Thanksgiving.

MS. STRICKLAND: That is a safe assumption. Thank

you. But we'll do whatever your Honor wants.

THE COURT: We can come in on December 2nd. Is that all right?

MS. STRICKLAND: Your Honor, I can't. This is why -- I actually have a hearing -- I know you won't feel sorry for me, but I actually have a hearing that I must be at in Honolulu on December 3rd.

THE COURT: That's terrible.

MS. STRICKLAND: Perhaps we can reconvene in Honolulu.

THE COURT: Oh, you're going to be in Honolulu on the 2nd?

MS. STRICKLAND: I'm going to be in Honolulu, right, the 2nd, 3rd, and 4th. The 1st would work. The 7th would work.

THE COURT: How about Thursday the 10th?

MS. TERRELL: Your Honor, I have a mediation in California I need to be at.

THE COURT: Okay. How about --

MS. STRICKLAND: I'm sorry, your Honor. What date?

THE COURT: The 10th has been rejected.

MS. STRICKLAND: The 10th works for us, but --

THE COURT: How about the 9th?

MS. STRICKLAND: So, I can't do the 9th.

THE COURT: Okay.

MS. STRICKLAND: The entire following week is out. Does that help? In fact, the 15th, we have a hearing here in another matter.

THE COURT: Oh, 15th in the afternoon?

MS. TERRELL: That's fine with me, your Honor.

THE COURT: Okay. Then the 15th it is.

MS. STRICKLAND: That's all right with me, your Honor.

THE COURT: Then the 15th it is. Let's say 2:00 o'clock.

MS. STRICKLAND: Thank you very much, your Honor.

MS. TERRELL: Thank you, your Honor.

THE COURT: Sure. Anything else from anybody, from our objectors?

MR. GEFFIN: No, nothing further. Thank you, your Honor.

THE COURT: Okay. Thank you. Safe travels to everybody who's traveling.

MS. STRICKLAND: Thank you very much.

MS. TERRELL: Thank you, your Honor.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Charles R. Zandi *January 6, 2016*

Charles R. Zandi
Official Court Reporter

Date